

The Honorable James L. Robart

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MICROSOFT CORPORATION, a Washington
corporation,

Plaintiff,

v.

MOTOROLA, INC., MOTOROLA
MOBILITY, INC., and GENERAL
INSTRUMENT CORPORATION.,

Defendants.

CASE NO. C10-1823-JLR

MOTOROLA MOBILITY'S AND
GENERAL INSTRUMENT'S MOTION
TO FILE DOCUMENTS UNDER SEAL
IN SUPPORT OF THE MOTION FOR
PARTIAL SUMMARY JUDGMENT

**NOTE ON MOTION CALENDAR:
Friday, July 27, 2012**

MOTOROLA MOBILITY'S AND GENERAL INSTRUMENT'S
MOTION TO FILE DOCUMENTS UNDER SEAL IN SUPPORT
OF THE MOTION FOR PARTIAL SUMMARY JUDGMENT
CASE NO. C10-1823-JLR

SUMMIT LAW GROUP PLLC
315 FIFTH AVENUE SOUTH, SUITE 1000
SEATTLE, WASHINGTON 98104-2682
Telephone: (206) 676-7000
Fax: (206) 676-7001

I. INTRODUCTION

Pursuant to Western District of Washington Civil Local Rule CR 5(g)(2), Defendants Motorola Mobility, Inc. and General Instrument Corporation (collectively, “Motorola”)¹ respectfully move this Court for leave to file under seal the following:

1. Motorola Mobility’s and General Instrument’s Motion for Partial Summary Judgment; and
2. Exhibits 2-4, 6, 8-11, and 17 to the Declaration of Kevin J. Post.

II. BACKGROUND

Microsoft Corporation (“Microsoft”) and Motorola entered into a stipulated Protective Order, which was approved by the Court on July 21, 2011. (Dkt. No. 72.) This Protective Order outlines categories of material that should be maintained in confidence, along with procedures for sealing confidential material when included in documents filed with the Court. Specifically, paragraph 1 specifies that:

Confidential Business Information is information which has not been made public and which concerns or relates to the trade secrets ... amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or other organization, the disclosure of which information is likely to have the effect of causing substantial harm to the competitive position of the person, firm, partnership, corporation, or other organization from which the information was obtained....

Id. at 1-2. This information should be marked as “CONFIDENTIAL BUSINESS INFORMATION, SUBJECT TO PROTECTIVE ORDER.” *Id.* at 2. Additionally, paragraph 6 specifies that:

(1) Confidential Business Information pertaining to licensing or other commercially sensitive financial information shall not be made available under this paragraph 6 to such designated in-house counsel; the supplier shall designate such Confidential Business Information pertaining to licensing or other commercially sensitive financial information as “[SUPPLIER’S NAME] CONFIDENTIAL FINANCIAL INFORMATION – OUTSIDE ATTORNEYS’ EYES ONLY – SUBJECT TO PROTECTIVE ORDER” and promptly provide a redacted version of such document that may be disseminated to the two in-house counsel designated under this paragraph 6....

¹ Motorola Solutions, Inc., which is now independent from Motorola Mobility and General Instrument, takes no position on the issues raised in the Motion for Partial Summary Judgment.

1 *Id.* at 4. Finally, Paragraph 2 of the Protective Order governs the sealing of documents, and states
 2 in relevant part that:

3 During the pre-trial phase of this action, such information, whether submitted in
 4 writing or in oral testimony, shall be disclosed only *in camera* before the Court
 5 and shall be filed only under seal, pursuant to Rule 5(g) of the Local Civil Rules
 6 of the United States District Court for the Western District of Washington.

7 *Id.* at 2.

8 Thus, the Protective Order provides that Motorola may request to seal documents by
 9 formal motion pursuant to Rule 5(g) of the Local Civil Rules of the Western District of
 10 Washington. Local Rule CR 5(g)(3) states that:

11 If a party seeks to have documents filed under seal and no prior order in the case
 12 or statute specifically permits it, the party must obtain authorization to do so by
 13 filing a motion to seal or a stipulation and proposed order requesting permission
 14 to file specific documents under seal. The court will allow parties to file entire
 15 memoranda under seal only in rare circumstances. A motion or stipulation to seal
 16 usually should not itself be filed under seal. A declaration or exhibit filed in
 17 support of the motion to seal may be filed under seal if necessary. If possible, a
 18 party should protect sensitive information by redacting documents rather than
 19 seeking to file them under seal. A motion or stipulation to seal should include an
 20 explanation of why redaction is not feasible.

21 Similarly, federal law recognizes that courts should protect trade secrets or other
 22 confidential commercial information by reasonable means, permitting the filing under seal of
 23 documents containing such information. *See* Fed. R. Civ. P. 26(c)(1)(G) and (H) (stating that a
 24 court may require that (1) “a trade secret or other confidential research, development, or
 25 commercial information not be revealed or be revealed only in a specified way” and (2) “the
 26 parties simultaneously file specified documents or information in sealed envelopes...”).

Though courts recognize a general right to inspect and copy public records and documents,
 including judicial records, the United States Supreme Court has stated that this right is limited.
 “[T]he right to inspect and copy judicial records is not absolute. Every court has supervisory
 power over its own records and files, and access has been denied where court files might have
 become a vehicle for improper purposes.” *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 598

(1978). In discussing examples of improper purposes, the Court indicated that courts are not to serve as “sources of business information that might harm a litigant’s competitive standing.” *Id.*

As the Ninth Circuit stated:

The law, however, gives district courts broad latitude to grant protective orders to prevent disclosure of materials for many types of information, including, but not limited to, trade secrets or other confidential research, development, or commercial information. See Fed. R. Civ. P. 26(c)(7). Rule 26(c) authorizes the district court to issue “any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden.” The Supreme Court has interpreted this language as conferring “broad discretion on the trial court to decide when a protective order is appropriate and what degree of protection is required.” *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 36 (1984).

Phillips v. General Motors Corp., 307 F.3d 1206, 1211 (9th Cir. 2002).

III. THE PROTECTIVE ORDER BOTH PERMITS AND REQUIRES MOTOROLA TO FILE THIS MOTION FOR LEAVE TO SEAL

In accordance with the Protective Order and the above-referenced authority, Motorola moves to file the following documents under seal for the stated reasons:

A. Defendants’ Motion for Partial Summary Judgment (“Motion”)

Motorola respectfully requests that its Motion be filed under seal because of citation to, and description of: (1) confidential testimony and reports from action before the ITC; (2) licensing agreements entered into between Motorola and certain third parties; (3) licensing agreements entered into between Microsoft and certain third parties; and (4) confidential settlement offers. Because this information is contained in the Motion, Motorola has marked this document as containing “OUTSIDE ATTORNEYS’ EYES ONLY – SUBJECT TO PROTECTIVE ORDER.”

The licensing information contained in the Motion is highly confidential and proprietary business information. Disclosure of this information to third parties and other party employees not covered by the protective order would have the potential to lead to competitive harm. In lieu of sealing the entire Motion, Motorola has redacted only those portions of its brief that disclose this highly confidential information. Redactions were made to limit as little information as possible, leaving the remainder available for public review.

B. Exhibits 2-4, 6, 8-11, and 17 to the Declaration of Kevin J. Post

Exhibit 2 is a true and correct copy of selected pages from the transcript of the January 20, 2012 hearing held in *Certain Gaming and Entertainment Consoles, Related Software, and Components Thereof*, Inv. No. 337-TA-752 (U.S.I.T.C.) by ALJ Shaw, which reproduces the confidential sworn testimony given by Kirk W. Dailey in that hearing.

This sworn testimony was given during a Confidential session in the ITC hearing and is covered by the Protective Order in that case. Pursuant to an agreement between the parties, this testimony was produced and may be relied upon in this case. It has been marked as “Contain[ing] Motorola Mobility, Inc. and/or Third Party Confidential Business Information, Subject to Protective Order – Attorneys’ Eyes Only.” Accordingly, this confidential information is covered by the protective order in both cases. Throughout his testimony, Mr. Dailey disclosed highly confidential information about Motorola’s licenses, licensing history and internal business practices. Disclosure of this information to third parties and other party employees not covered by the protective order would have the potential to lead to competitive harm. Due to presence of this highly confidential information throughout the transcript, Exhibit 2 should be sealed in its entirety.

This document was previously submitted to the Court as Exhibit 2 to the March 30, 2012 Declaration of Kevin J. Post in Support of Defendants’ Motion for Partial Summary Judgment (Dkt. No. 230), and was previously ordered sealed by the Court (Dkt. No. 294).

Exhibit 3 is a true and correct copy of the April 2009 Patent License Agreement between Microsoft Corporation and Commonwealth Scientific and Industrial Research Organisation (CSIRO), bearing production numbers MS-MOTO_1823_00005195128-152.

This license agreement is a highly confidential agreement between Microsoft and CSIRO, a non-party to this litigation, and has been marked by Microsoft as OUTSIDE COUNSEL-ATTORNEY’S EYES ONLY. Although the agreement indicates that the parties may disclose its existence to third parties, the terms of the agreement were kept in confidence. Disclosure of this information to third parties and other party employees not covered by the protective order would

1 have the potential to lead to competitive harm. Due to presence of this highly confidential
2 information throughout the license, Exhibit 3 should be sealed in its entirety.

3 Exhibit 4 is a true and correct copy of the Rebuttal Testimony of Kirk Dailey, marked as
4 Hearing Exhibit CX-778C and admitted into evidence in *Certain Gaming and Entertainment*
5 *Consoles, Related Software, and Components Thereof*, Inv. No. 337-TA-752 (U.S.I.T.C.) by ALJ
6 Shaw).

7 This testimony was marked as containing Confidential Business Information and was
8 admitted as a Confidential Hearing Exhibit in ITC Inv. No. 337-TA-752. Pursuant to an
9 agreement between the parties, this testimony was produced and may be relied upon in this case.
10 It has been marked as “Contain[ing] Motorola Mobility, Inc. and/or Third Party Confidential
11 Business Information, Subject to Protective Order – Attorneys’ Eyes Only.” Accordingly, this
12 confidential information is covered by the protective order in both cases. Throughout his
13 testimony, Mr. Dailey disclosed highly confidential information about Motorola’s licenses,
14 licensing history and internal business practices. Disclosure of this information to third parties
15 and other party employees not covered by the protective order would have the potential to lead to
16 competitive harm. Due to presence of this highly confidential information throughout the exhibit,
17 Exhibit 4 should be sealed in its entirety.

18 This document was previously submitted to the Court as Exhibit 4 to the March 30, 2012
19 Declaration of Kevin J. Post in Support of Defendants’ Motion for Partial Summary Judgment
20 (Dkt. No. 230), and was previously ordered sealed by the Court (Dkt. No. 294).

21 Exhibit 6 is a true and correct copy of the Rebuttal Expert Testimony of Dr. David J.
22 Teece, marked as Hearing Exhibit CX-759C and admitted into evidence in *Certain Gaming and*
23 *Entertainment Consoles, Related Software, and Components Thereof*, Inv. No. 337-TA-752
24 (U.S.I.T.C.) by ALJ Shaw.

25 This testimony was marked as containing Confidential Business Information and was
26 admitted as a Confidential Hearing Exhibit in ITC Inv. No. 337-TA-752. Pursuant to an

1 agreement between the parties, this testimony was produced and may be relied upon in this case.
2 It has been marked as “Contain[ing] Motorola Mobility, Inc. and/or Third Party Confidential
3 Business Information, Subject to Protective Order – Attorneys’ Eyes Only.” Accordingly, this
4 confidential information is covered by the protective order in both cases. Throughout his
5 testimony, Dr. Teece disclosed highly confidential information about Motorola’s licenses and
6 licensing history. Disclosure of this information to third parties and other party employees not
7 covered by the protective order would have the potential to lead to competitive harm. Due to
8 presence of this highly confidential information throughout the exhibit, Exhibit 6 should be sealed
9 in its entirety.

10 This document was previously submitted to the Court as Exhibit 6 to the March 30, 2012
11 Declaration of Kevin J. Post in Support of Defendants’ Motion for Partial Summary Judgment
12 (Dkt. No. 230), and was previously ordered sealed by the Court (Dkt. No. 294).

13 Exhibit 8 is a true and correct copy of Motorola Mobility, Inc.’s Written Responses to
14 Certain Topics of Microsoft’s Third Amended 30(b)(6) Notice of Deposition and attached Exhibit
15 E, which was served via email on April 12, 2012.

16 This document is marked as “Contain[ing] Motorola and Third-Party Confidential
17 Financial Information – Outside Attorneys’ Eyes Only – Subject to Protective Order.” The
18 document, including its attached Exhibit E, summarizes and discloses confidential information
19 about highly confidential licensing agreements between Motorola and various third-parties who
20 are non-parties to this litigation. Although many of the agreements summarized in this document
21 indicate that the parties may disclose their existence to others, the terms of each agreement have
22 been maintained in confidence. Disclosure of this information to third parties and other party
23 employees not covered by the protective order would have the potential to lead to competitive
24 harm. Due to presence of this highly confidential information throughout the document and its
25 exhibit, Exhibit 8 should be sealed in its entirety.

1 This document was previously submitted to the Court as Exhibit 27 to the April 13, 2012
2 Second Declaration of Kevin J. Post in Support of Defendants' Opposition to Microsoft's Motion
3 for Partial Summary Judgment of Breach of Contract (Dkt. No. 273), and was previously ordered
4 sealed by the Court (Dkt. No. 336).

5 Attached as Exhibit 9 is a true and correct copy of selected pages from a document titled
6 "Expert Report of Louis P. Berneman, Ed D, CLP," dated June 20, 2011, marked as
7 "CONTAIN[ING] CONFIDENTIAL BUSINESS INFORMATION SUBJECT TO
8 PROTECTIVE ORDER," and submitted in *Certain Mobile Devices, Associated Software, and*
9 *Components Thereof*, ITC Inv. No. 337-TA-744. Pursuant to an agreement between the parties,
10 this report may be relied upon in this case.

11 This report has been marked as "Contain[ing] Confidential Business Information, Subject
12 to Protective Order." Accordingly, this confidential information is covered by the protective order
13 in this case and the 337-TA-744 Investigation. Disclosure of this information to third parties and
14 other party employees not covered by the protective orders would have the potential to lead to
15 competitive harm. Due to presence of this confidential information throughout the document,
16 Exhibit 9 should be sealed in its entirety.

17 This document was previously submitted to the Court as Exhibit 29 to the April 13, 2012
18 Second Declaration of Kevin J. Post in Support of Defendants' Opposition to Microsoft's Motion
19 for Partial Summary Judgment of Breach of Contract (Dkt. No. 273), and was previously ordered
20 sealed by the Court (Dkt. No. 336).

21 Exhibit 10 is a true and correct copy of the Rebuttal Expert Witness Testimony of Richard
22 J. Holleman, marked as Hearing Exhibit CX-758C and admitted into evidence in *Certain Gaming*
23 *and Entertainment Consoles, Related Software, and Components Thereof*, Inv. No. 337-TA-752
24 (U.S.I.T.C.) by ALJ Shaw.

25 This testimony was marked as containing Confidential Business Information and was
26 admitted as a Confidential Hearing Exhibit in ITC Inv. No. 337-TA-752. Pursuant to an

1 agreement between the parties, this testimony was produced and may be relied upon in this case.
2 It has been marked as “Contain[ing] Motorola Mobility, Inc. and/or Third Party Confidential
3 Business Information, Subject to Protective Order – Attorneys’ Eyes Only.” Accordingly, this
4 confidential information is covered by the protective order in both cases. Throughout his
5 testimony, Mr. Holleman disclosed highly confidential information about Motorola’s licenses and
6 licensing history. Disclosure of this information to third parties and other party employees not
7 covered by the protective order would have the potential to lead to competitive harm. Due to
8 presence of this highly confidential information throughout the exhibit, Exhibit 10 should be
9 sealed in its entirety.

10 This document was previously submitted to the Court as Exhibit 10 to the March 30, 2012
11 Declaration of Kevin J. Post in Support of Defendants’ Motion for Partial Summary Judgment
12 (Dkt. No. 230), and was previously ordered sealed by the Court (Dkt. No. 294).

13 Exhibit 11 is a true and correct copy of the December 1, 2011 Patent License Agreement
14 between Motorola Mobility, Inc. and VTech Communications, Inc. and VTech
15 Telecommunications, Ltd., bearing production numbers MOTM_WASH1823_0394368-4401.

16 This document is a highly confidential agreement between Motorola Mobility, Inc. and
17 VTech, a non-party to this litigation. Although the Agreement indicates that the parties may
18 disclose its existence to third parties, Motorola and VTech have agreed that the terms only be
19 disclosed in a pending litigation subject to a protective order using the highest available and
20 appropriate confidentiality designation. *See* § 9.3(b). Disclosure of the terms to third parties not
21 covered by the protective order would have the potential to lead to competitive harm. Due to
22 presence of highly confidential information throughout the license, the Motorola Mobility-VTech
23 license should be sealed in its entirety.

24 This document was previously submitted to the Court as Exhibit A (Dkt. No. 183) to the
25 Declaration of Philip S. McCune in Support of Defendants’ Opposition to Microsoft’s Motion for
26

Summary Judgment (Dkt. No. 182), and was previously ordered sealed by the Court (Dkt. No. 187).

Exhibit 17 is a true and correct copy of the June 2006 Patent License Agreement between Motorola, Inc. and BenQ Corporation and BenQ Mobile GmbH & Co. OHG, bearing production numbers MOTM_WASH1823_0023674-749.

This license agreement is a highly confidential agreement between Motorola, Inc. and BenQ Corporation and BenQ Mobile GmbH & Co. OHG, non-parties to this litigation, and is marked “Motorola Confidential and Proprietary” and CONFIDENTIAL BUSINESS INFORMATION, ATTORNEYS’ EYES ONLY, SUBJECT TO PROTECTIVE ORDER. Although the agreement indicates that the parties may disclose its existence to third parties, the terms of the agreement were kept in confidence. Disclosure of this information to third parties and other party employees not covered by the protective order would have the potential to lead to competitive harm. Due to presence of this highly confidential information throughout the license, Exhibit 17 should be sealed in its entirety.

IV. CONCLUSION

For the foregoing reasons, Motorola respectfully requests that this Court order that the following documents be filed under seal:

1. Motorola Mobility’s and General Instrument’s Motion for Partial Summary Judgment; and
2. Exhibits 2-4, 6, 8-11, and 17 to the Declaration of Kevin J. Post.

1 DATED this 18th day of July, 2012.

2 SUMMIT LAW GROUP PLLC

3 By /s/ Ralph H. Palumbo

4 Ralph H. Palumbo, WSBA #04751

5 Philip S. McCune, WSBA #21081

6 Lynn M. Engel, WSBA #21934

ralphp@summitlaw.com

philm@summitlaw.com

lynne@summitlaw.com

7 By /s/ K. McNeill Taylor, Jr.

8 K. McNeill Taylor, Jr.

MOTOROLA MOBILITY, INC.

MD W4-150

600 North U.S. Highway 45

Libertyville, IL 60048-1286

Phone: 858-404-3580

Fax: 847-523-0727

12 And by

13 Jesse J. Jenner (*pro hac vice*)

14 Steven Pepe (*pro hac vice*)

Ropes & Gray LLP

1211 Avenue of the Americas

New York, NY 10036-8704

(212) 596-9046

jesse.jenner@ropesgray.com

steven.pepe@ropesgray.com

18 James R. Batchelder (*pro hac vice*)

19 Norman H. Beamer (*pro hac vice*)

Ropes & Gray LLP

1900 University Avenue, 6th Floor

East Palo Alto, CA 94303-2284

(650) 617-4030

james.batchelder@ropesgray.com

norman.beamer@ropesgray.com

22 ***Attorneys for Motorola Solutions, Inc., Motorola***
23 ***Mobility, Inc., and General Instrument Corp.***

CERTIFICATE OF SERVICE

I hereby certify that on this day I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Arthur W. Harrigan, Jr., Esq.
Christopher T. Wion, Esq.
Shane P. Cramer, Esq.
Danielson, Harrigan, Leyh & Tollefson LLP
arthurh@dhl.com
chrisw@dhl.com
shanec@dhl.com

Richard A. Cederroth, Esq.
Brian R. Nester, Esq.
David T. Pritikin, Esq.
Douglas I. Lewis, Esq.
John W. McBride, Esq.
David Greenfield, Esq.
William H. Baumgartner, Jr., Esq.
David C. Giardina, Esq.
Carter G. Phillips, Esq.
Constantine L. Trela, Jr., Esq.
Ellen S. Robbins, Esq.
Nathaniel C. Love, Esq.
Sidley Austin LLP
rcederroth@sidley.com
bnester@sidley.com
dpritikin@sidley.com
dilewis@sidley.com
jwmcbride@sidley.com
david.greenfield@sidley.com
wbaumgartner@sidley.com
dgiardina@sidley.com
cphillips@sidley.com
ctrela@sidley.com
erobbins@sidley.com
nlove@sidley.com

T. Andrew Culbert, Esq.
David E. Killough, Esq.
Microsoft Corp.
andycu@microsoft.com
davkill@microsoft.com

DATED this 18th day of July, 2012.

/s/

Marcia A. Ripley

Marcia A. Ripley